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Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

JOSEPH M. SKUTCHES, M.D. and
ST. LUKE'S PHYSICIAN GROUP,

Petitioners,

v.

BARBARA L. GLASOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Judge Jack A. Panella of the Pennsylvania Superior Court voted with the majority in a two-to-one appellate ruling that reinstated a large medical malpractice verdict for Respondent Barbara Glasow. After that ruling, Petitioners learned that Judge Panella enjoys a close, longstanding relationship with Martin D. Cohen, Esq., the lead named partner in the small law firm that represents Ms. Glasow. This relationship is established by the following: (1) Attorney Cohen was one of two people selected by Judge Panella to perform the robing ceremony at Judge Panella's investiture on the Pennsylvania Superior Court; (2) in his speech following the robing ceremony, Judge Panella specifically thanked Attorney Cohen for his "guidance and support" and identified him as one of "my good buddies;" (3) Judge Panella, whose office is in the same small town (Bethlehem, PA) as Attorney Cohen's office, spoke on Attorney Cohen's behalf at an honorary event in which other speakers included Cohen's lifelong friend and business partner; and (4) Attorney Cohen and the other named partner of his law firm made substantial financial contributions to Judge Panella during the 2003 election campaign, which resulted in Judge Panella's election to the Pennsylvania Superior Court.

The question presented is whether Judge Panella's failure to either recuse himself or disclose his close, personal relationship with Attorney Cohen raised such a distinct appearance of impropriety that it violated the Due Process Clause of the Fourteenth Amendment.

RULE 29.6 STATEMENT

The parties to this case and appeal are all identified in the caption: Respondent Barbara L. Glasow and Petitioners Joseph M. Skutches, M.D., and St. Luke's Physician Group.

Petitioner St. Luke's Physician Group is a wholly-owned subsidiary corporation of St. Luke's Hospital, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW ...	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
CITATIONS TO REPORTS OF OPINIONS AND ORDERS	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
JUDGE PANELLA'S FAILURE TO EITHER RECUSE HIMSELF OR DISCLOSE HIS CLOSE, PERSONAL RELATIONSHIP WITH ATTORNEY COHEN VIOLATED PETITIONERS' DUE PROCESS RIGHTS	7

Contents

Page

A. This Court's Due Process Precedent Was Violated When Judge Panella Failed To Either Recuse Himself Or Disclose His Close, Personal Relationship With Attorney Cohen .. 7

B. The Question Presented Is Critical To The Preservation Of Public Confidence In State Judicial Systems Across The Nation 16

CONCLUSION 18

TABLE OF APPENDICES

Page

Appendix A — Memorandum And Dissenting Memorandum Of The Superior Court Of Pennsylvania Filed June 4, 2009 ..... 1a

Appendix B — Opinion Of The Court Of Common Pleas Of Lehigh County, Pennsylvania, Civil Division Filed June 3, 2008 ..... 33a

Appendix C — Order Of The Supreme Court Of Pennsylvania, Middle District Denying Petition For Allowance Of Appeal Dated May 26, 2010 ..... 60a

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Life Insurance Co. v. Lavoie,
475 U.S. 813 (1986) 9, 10

Caperton v. A.T. Massey Coal Co., Inc.,
129 S.Ct. 2252 (2009) ..... *passim*

Commonwealth Coatings Corp. v. Cont'l Cas. Co.,
393 U.S. 145 (1968) 2

Commonwealth v. Whitmore,
912 A.2d 827 (Pa. 2006) 8

Hood v. State,
158 S.W.3d 480 (Texas Crim. App. 2005) 17

In Interest of McFall,
617 A.2d 707 (Pa. 1992) 8

In re Cicchetti,
743 A.2d 431 (Pa. 2000) 8

In re Murchison,
349 U.S. 133 (1955) 7, 9, 10

Mayberry v. Pennsylvania,
400 U.S. 455 (1971) 9, 10

Mistretta v. United States,
488 U.S. 361 (1989) 16

Cited Authorities

Page

Mistretta v. United States,
488 U.S. 361 (1989) 3

N.Y. State Bd. of Elections v. Lopez Torres,
128 S. Ct. 791 (2008) 16

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 16

Richmond Newspapers v. Virginia,
448 U.S. 555 (1980) 11

Ward v. Vill. of Monroeville,
409 U.S. 57 (1972) 7

Withrow v. Larkin,
421 U.S. 35 (1975) 9

United States Constitution:

Fourteenth Amendment ..... i, 2

Statutes:

Pa. Code Judicial Conduct 3 (c)(1)(2008) 8

Pennsylvania Rule of Appellate Procedure
2542(a) 14

Page

Other:

Interbranch Commission on Juvenile Justice Act, 2009 Pa. Sess. Law 1648 (Aug. 7, 2009) ... 17

Pennsylvania Law Weekly article, October 5, 2009 12

Pennsylvania Law Weekly article, October 26, 2009 14

Ian Urbina, Despite Red Flags about Judges, A Kickback Scheme Flourished, *N.Y. Times* (Mar. 27, 2009) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Joseph M. Skutches, M.D., and St. Luke's Physician Group, respectfully submit this petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania.

CITATIONS TO REPORTS OF OPINIONS AND ORDERS

The Order of the trial court dated May 27, 2008, which awarded judgment notwithstanding the verdict, was not reported. *See Glasow v. Skutches*, No. 2006-C-2210V, Court of Common Pleas of Lehigh County, Pennsylvania (May 27, 2008). (*See* Appendix "B").

The Order and Memorandum of the Pennsylvania Superior Court dated June 4, 2009, which reversed the judgment of the Court of Common Pleas of Lehigh County and reinstated the jury verdict for Plaintiff, was unpublished, but the result is reported at *Glasow v. Skutches*, 981 A.2d 327, 2009 Pa. Super. LEXIS 3593 (Pa. Super., 2009)(unpublished). (*See* Appendix "A").

The Order of the Pennsylvania Supreme Court dated May 26, 2010, which denied allocatur, was reported at *Glasow v. Skutches*, 2010 Pa. LEXIS 1132 (May 26, 2010). (*See* Appendix "C").

JURISDICTION

This Honorable Court is asked to review the Order of the Pennsylvania Supreme Court dated May 26, 2010, which denied Petitioners' Petition for Allowance of Appeal. (*See* Appendix "D"). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

"[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). This case affords a much-needed opportunity for this Court to clarify the circumstances in which a close personal relationship between a judge and a litigant or attorney creates such a distinct "appearance of bias" that due process requires the judge to either recuse himself or disclose the relationship prior to ruling. This question is vitally important to preserving the "reputation for impartiality and nonpartisanship," and

thus the legitimacy, of the judiciary. *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

This is a medical malpractice action that proceeded to trial in the Court of Common Pleas of Lehigh County, Pennsylvania, from January 14, 2008, through January 18, 2008. At trial, Respondent Barbara Glasow ("Ms. Glasow") claimed that Petitioner Joseph M. Skutches ("Dr. Skutches"), her former gynecologist and an alleged agent of Petitioner St. Luke's Physician Group ("St. Luke's"), deviated from the applicable standard of care when he saw her for a breast lump. More specifically, Ms. Glasow claimed that Dr. Skutches failed to properly advise her to have a biopsy, which would have revealed that the breast lump was malignant, delaying a diagnosis and adversely affecting her subsequent treatment and prognosis.

Dr. Skutches and St. Luke's defended by maintaining that Skutches clearly adhered to the applicable standard of care by recommending that Ms. Glasow consult with a surgeon who could and would have determined whether she required a biopsy, and, more importantly, by prescribing an ultrasound for Glasow (because she refused to have a mammogram) that would have been diagnostic if she had not neglected to have the ultrasound performed. Dr. Skutches and St. Luke's also maintained that Ms. Glasow's choice of post-diagnosis treatment for her breast lump, involving a form of "alternative medicine" known as "complimentary medicine" rather than generally-accepted medical care, had a substantial negative impact on her prognosis for which she herself was responsible.

On January 18, 2008, the jury returned a verdict finding Dr. Skutches negligent and Ms. Glasow contributorily negligent, with a comparative negligence assessment allocating a sixty-five percent share to Dr. Skutches (and, by way of vicarious liability, to St. Luke's) and a thirty-five percent share to Ms. Glasow. The verdict for Ms. Glasow totaled $2,582,450, after reduction for her allocated contributory negligence.

By Order dated May 27, 2008, the trial court granted a judgment n.o.v. on the ground that the expert testimony proffered by Ms. Glasow regarding the standard of care was not based on the standard of reasonable medical certainty required by Pennsylvania law. (*See* Appendix "B," Trial Court Opinion in support of May 27, 2008 Order). Ms. Glasow appealed as of right to the Pennsylvania Superior Court.

On January 7, 2009, the case was argued before a three-judge panel of the Superior Court, consisting of Judge Jack A. Panella, Judge John T. Bender, and Senior Judge John T.J. Kelly, Jr. By Order and Memorandum dated June 4, 2009, the Superior Court panel voted two-to-one, with Senior Judge Kelly and Judge Panella in the majority and Judge Bender dissenting, to reverse the judgment of the trial court and reinstate the jury verdict for Ms. Glasow. (*See* Appendix "A," Superior Court Majority and Dissenting Memoranda, June 4, 2009).

Following the June 4th ruling, counsel for Dr. Skutches and St. Luke's obtained public records indicating that Judge Panella, who hails from Northampton County in the Lehigh Valley, has a close,

longstanding relationship with Martin D. Cohen, Esq., the founder and lead named partner of the small Lehigh Valley law firm that represents Ms. Glasow. Most importantly, counsel for Dr. Skutches and St. Luke's obtained the transcript of the ceremony honoring Judge Panella's investiture on the Superior Court on January 4, 2004.[1] At that ceremony, Attorney Cohen was one of two people selected by Judge Panella to perform the robing ceremony. Judge Panella then spoke to those assembled and specifically identified and thanked Attorney Cohen for his "guidance and support." Judge Panella also identified Attorney Cohen as one of "my good buddies."

In addition to Attorney Cohen's involvement in Judge Panella's investiture, the *Allentown Morning Call* reported that Judge Panella spoke on Attorney Cohen's behalf at a dinner honoring the latter's commitment to Penn State University and the Lehigh Valley community. Judge Panella is the first of five speakers identified in the article. The other four speakers were Attorney Cohen's longtime business partner, a "lifelong friend," the president of the organization hosting the dinner, and the president of the United Way of the Greater Lehigh Valley.

Finally, the Pennsylvania Department of State's campaign finance records indicate that Attorney Cohen and the firm's other named partner made substantial financial contributions, totaling at least $4,500, to Judge

[1] This transcript was published in the *Pennsylvania Superior Court Reporter* on the occasion of Judge Panella's investiture.

Panella during the 2003 election campaign, which resulted in Judge Panella's election to this Court.

On June 18, 2009, based in part on the newly-discovered close relationship between Judge Panella and Attorney Cohen, Petitions filed an Application for Reargument in the Pennsylvania Superior Court. The Application, which asserted a federal due process violation, relied heavily on the standards for judicial disqualification set forth by this Court in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009). By Order dated August 11, 2009, the Superior Court denied Petitioners' Application for Reargument. (*See* Appendix "C").

On September 8, 2009, Petitioners filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court. The Petition again asserted a federal due process violation and relied heavily on *Caperton, supra*. By Order dated May 26, 2010, the Pennsylvania Supreme Court denied allowance of appeal. (Appendix "C").

REASONS FOR GRANTING THE PETITION

JUDGE PANELLA'S FAILURE TO EITHER RECUSE HIMSELF OR DISCLOSE HIS CLOSE, PERSONAL RELATIONSHIP WITH ATTORNEY COHEN VIOLATED PETITIONERS' DUE PROCESS RIGHTS

A. This Court's Due Process Precedent Was Violated When Judge Panella Failed To Either Recuse Himself Or Disclose His Close, Personal Relationship With Attorney Cohen

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton*, *supra.*, 129 S.Ct. at 2259, citing *In re Murchison*, 349 U.S. 133, 136 (1955). A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136. This "stringent rule," the Court has explained, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted).

This Court has elucidated these principles in a series of important cases in which judicial bias was alleged. Most recently, in *Caperton*, this Court examined a scenario in which a state supreme court justice who had received substantial campaign contributions from the

principal officer of a corporation then refused to recuse himself and cast the deciding vote to overturn a large verdict against the corporation. Reversing the state court judgment, this Court reaffirmed that the Due Process Clause requires an objective inquiry to determine whether "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 2257 (internal quotation marks omitted). As this Court explained, the standard for recusal is "not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Id.* at 2262 (internal quotation marks omitted).[2] "[T]he disqualifying criteria cannot be defined with precision. *Circumstances and relationships must be considered.*" *Id.* at 2261 (internal quotation marks and citation omitted; emphasis added). Cases involving "extreme facts" or an "extraordinary situation" are more likely to meet the constitutional standard for recusal. *Id.* at 2265.

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[2] Pennsylvania also embraces this objective standard of reasonableness to determine whether judicial disqualification is required. For instance, the Pennsylvania Code of Judicial Conduct states that "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned[.]" Pa. Code Judicial Conduct 3 (c)(1)(2008). Where a judge's participation in a case creates an appearance of prejudice or impropriety, disqualification is required. *See, Commonwealth v. Whitmore*, 912 A.2d 827, 834 (Pa. 2006), *citing In Interest of McFall*, 617 A.2d 707, 714 (Pa. 1992)("There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings."). Maintaining both the fact and the appearance of impartiality are "fundamental to public confidence in the judiciary[.]" *In re Cicchetti*, 743 A.2d 431, 442 (Pa. 2000).

In *Murchison*, *supra.*, this Court held that a due process violation occurred when a judge who acted as a "one-man judge-grand jury" in charging a witness with contempt then convicted the defendant of that charge. Having been the accuser, this Court explained, it was unlikely that the judge could be "wholly disinterested" in the outcome of the contempt proceedings. *Id.* at 137.

Likewise, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), this Court held that a judge who had been subjected to repeated verbal abuse by a criminal defendant could not preside over the defendant's criminal contempt proceedings. *Id.* at 466. Although there was no evidence of actual bias, recusal was required because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Id.* at 465; *see also*, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (stating that a judge who "has been the target of personal abuse or criticism from the party before him" cannot preside in a case involving that part because "experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable").

Finally, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court found a due process violation where a state supreme court justice participated in the review of a case involving a legal issue that was similar to an issue in a case the justice himself had filed. *Id.* at 825. This Court explained that evidence of actual bias was not required. Instead, this Court had to consider only whether "sitting on the case then before the Supreme Court of Alabama would offer a possible temptation to the average . . . judge to . . . lead him not

to hold the balance nice, clear and true." *Id.* (alterations in original; internal quotation marks omitted). Involvement in a case that could influence the justice's own case presented precisely such a "temptation." *Id.*

This case involves the same type of "extraordinary situation" that has been found to violate due process. *Caperton*, 129 S.Ct. at 2265. Indeed, just as a judge is likely to be biased in favor of a friend or mentor, so too is he likely to be biased in favor of a large campaign benefactor (*Caperton*), or against a witness who the judge has already charged with contempt (*Murchison*), or against a criminal defendant who has repeatedly belittled the judge (*Mayberry*), or in favor of a litigant who argues a position that will assist the judge in his own litigation (*Lavoie*). Such biases are all matters of human nature, and they all violate due process.

Two critical facts make the appearance of impropriety in this case especially vivid. First, while *Caperton* involved financial contributions by an election benefactor, this case involves not only financial support but also a longstanding personal relationship – a relationship so close that Attorney Cohen was chosen to literally "robe" Judge Panella on his ascension to the Pennsylvania Superior Court. In the speech that followed, Judge Panella specifically identified and thanked Attorney Cohen for his "guidance and support," which were, apparently, critical to Judge Panella's success. Judge Panella also identified Attorney Cohen as one of "my good buddies."

Attorney Cohen's prominent role in Judge Panella's investiture ceremony undeniably distinguishes him as

a person who enjoys an especially close relationship with the judge. Such a relationship, which transcends mere financial ties, poses an overwhelming potential for bias that is offensive to due process. It is simply incredible to deny that, at a bare minimum, an appearance of impropriety arises where the head of a small law firm literally places the robe upon a judge who later votes with a one-judge majority to restore a multimillion verdict obtained by the attorney's firm. Whatever the temptation may be to disregard the guiding principle of neutrality on behalf of a campaign benefactor, the objective probability that bias will infect a judge's decisionmaking is far greater when a close friend and mentor has a large financial stake in the outcome of a case. The fact that Attorney Cohen and his small firm stood to earn a seven-figure fee from the reinstatement of the jury's verdict clearly raised "an unconstitutional potential for bias" on the part of Judge Panella. *Id.* at 2262.

Second, the relationship between Judge Panella and Attorney Cohen was never disclosed to the parties or to defense counsel; instead, it was uncovered only after Judge Panella cast the deciding vote to reinstate the verdict for Plaintiff. In contrast, in *Caperton*, the parties were fully aware of Mr. Blankenship's efforts on behalf of Justice Benjamin, they had an opportunity to seek the justice's recusal on at least three occasions, and the justice had an opportunity to consider and address the recusal requests. The likelihood of actual bias increases when the relationship at issue is not open to public scrutiny. *See*, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570 (1980) (opinion of Burger, C.J.) (recognizing the "nexus between openness, fairness, and the perception of fairness").

Indeed, in an interview granted during his 2009 campaign for the Pennsylvania Supreme Court, Judge Panella himself publicly declared that transparency of the judicial system is necessary to "ensure a fair opportunity in court for all of Pennsylvania's citizens." (*See Pennsylvania Law Weekly* article, October 5, 2009, p. 15; *accord*, *Id.*; "I believe the commonwealth would be better served if the judiciary acted with greater transparency and had to provide a better accounting of its actions."). When asked about the circumstances under which he would recuse himself, Judge Panella stated:

> With campaigns for judicial offices attracting more attention and larger campaign contributions, the potential for, and perceptions of, conflicts of interest have grown tremendously. Therefore, it is important that all judges hold themselves up to the highest ethical standards in order to maintain the public's faith in the judiciary. Therefore, I would recuse myself if a major campaign contributor were involved in litigation as a party or an attorney before me.
>
> . . .
>
> I believe that even an appearance of a conflict of interest triggers recusal. The judiciary must earn and maintain the respect of the electorate; even a mere "appearance" of an impropriety, rather than an established conflict, requires recusal.

(*Id.*, p. 16).

Under these standards, which are consistent with this Court's due process precedent, Judge Panella clearly should have recused himself or at least disclosed his relationship with Attorney Cohen. There can be no doubt that transparency of the judicial system is essential to maintaining its integrity, a mere appearance of a conflict undermines that integrity, and campaign contributions present a well-known threat to the impartiality of elected judges. Because his close relationship with Attorney Cohen created, at a bare minimum, a glaring appearance of impropriety, Judge Panella's subsequent vote to reinstate the verdict for Ms. Glasow was infected by a "probability of actual bias . . . too high to be constitutionally tolerable." *Caperton*, 129 S. Ct. at 2257 (internal quotation marks and citation omitted).

While this much is clear, and while this Court in *Caperton* certainly clarified the standard for recusal based upon significant financial ties, further explication of this murky area of the law is required. In particular, this Court should issue a writ of certiorari to provide authoritative guidance to lower state and federal courts on the standards for recusal or disclosure when a judge has not only financial connections to a litigant or its counsel but also an *especially close* and *undisclosed* personal relationship. *Caperton* poses but does not directly answer the question of whether such a relationship requires recusal.[3]

[3] Chief Justice Roberts' Dissenting Opinion in *Caperton* recognizes that the majority decision leaves unanswered the following question: "Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?" *Caperton*, 129 S. Ct. at 2270 (Roberts, C.J., Dissenting).

Moreover, this Court has not addressed the question of who – the judge or the parties – bears the burden of raising the judge's relationship with a party or attorney. There is evident confusion on this question. For instance, on October 26, 2009, the *Pennsylvania Law Weekly* carried a front-page story on the filing of the Petition for Allowance of Appeal in the Pennsylvania Supreme Court, which quoted Judge Panella as criticizing Dr. Skutches and St. Luke's for not raising his relationship with Attorney Cohen sooner. Specifically, although Judge Panella recognized that the Pennsylvania Code of Judicial Conduct prevented him from commenting on a pending case, he stated that "[t]he time to raise it and ask a judge to recuse is at the first time they know of it or should have known it. That was not done in this case." (*See Pennsylvania Law Weekly* article, October 26, 2009).[4]

Judge Panella's published comments suggest that *parties* and *their attorneys* have the burden to uncover and raise friendships or other personal relationships that

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[4] In point of fact, counsel for Dr. Skutches and St. Luke's did not learn of the close relationship between Judge Panella and Attorney Cohen (and, in particular, they did not learn that Attorney Cohen participated in Judge Panella's robing ceremony) until after June 4, 2009, the date on which Judge Panella voted with the majority to reinstate the verdict, and they raised the issue in an Application for Reargument filed on June 18, 2009, within the 14-day period for seeking reargument set forth in Pennsylvania Rule of Appellate Procedure 2542(a)(Time)("(1) Except as otherwise prescribed by this rule, an application for reargument shall be filed with the prothonotary within 14 days after entry of the judgment or other order involved.").

could compromise a judge's impartiality. This burden would prove impossible in many instances because parties and their attorneys generally will not have the time or resources to investigate a judge's interpersonal relationships.[5] Consequently, Dr. Skutches and St. Luke's believe that judges themselves have the obligation to disclose relationships that might raise the appearance of impropriety.

In this case, it was Judge Panella's own failure to disclose the relationship, not the lack of diligence by counsel for Dr. Skutches and St. Luke's, that prevented an earlier disclosure of the relationship. This Court should clarify the apparent confusion regarding who bears the burden of disclosing such relationships.

Review of Judge Panella's participation in this case is warranted to provide authoritative guidance to the lower courts regarding the circumstances in which due process requires recusal or disclosure based on a judge's close personal relationship with a party or its attorney. Judge Panella's refusal to recuse himself or disclose his relationship with Attorney Cohen conflicts with the constitutional standards articulated by this Court and substantially undermined the integrity of the Pennsylvania judicial system.

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[5] The impossibility of meeting this burden is magnified in appeals courts because of the short timelines involved and the large number of judges who might potentially hear the case. In the Pennsylvania Superior Court, for instance, litigants do not learn the identities of the judges who will hear the case until about 45 days before oral argument, and the panel will consist of three or nine judges. Even if parties have adequate resources, they could not adequately investigate each judge's background and relationships in such a short period of time.

B. The Question Presented Is Critical To The Preservation Of Public Confidence In State Judicial Systems Across The Nation

This Court has repeatedly emphasized the importance of maintaining our courts' "reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989); *see also*, *Republican Party of Minnesota v. White*, 536 U.S. 765, 802 (2002)(Stevens, J., dissenting) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *and N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring) ("The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.").

The events of this case implicate the reputation of state judiciaries and present a recurring issue of far-reaching national importance. In fact, while this Court accepted review in *Caperton* to address recusal standards in the context of campaign contributions in judicial elections, that decision impacted only the thirty-nine states that currently elect their judges. Here, the question of when a close personal relationship between a judge and litigant or attorney requires recusal or at least disclosure affects states with both elected and appointed judges. In other words, this case affects the judiciaries of all 50 states. Each of these court systems, and the judges who work within them, need clear guidance with respect to recusal and disclosure standards.

Finally, intervention by this Court is necessary to restore the waning reputations and integrity of state judiciaries. Highly publicized cases, like *Caperton* and *Hood v. State*, 158 S.W.3d 480 (Texas Crim. App. 2005), in which the prosecutor in a capital murder case had a long-term romantic relationship with the trial judge, reflect poorly on the impartiality of state courts. But perhaps the worst case of judicial misconduct has arisen in Pennsylvania itself, which is in the midst of the worst court scandal in its history. In 2009, two state-court judges were accused of accepting more than $2.6 million in kickbacks in exchange for sending thousands of juveniles to private detention centers. *See generally*, Ian Urbina, Despite Red Flags about Judges, A Kickback Scheme Flourished, *N.Y. Times* (Mar. 27, 2009). The Pennsylvania Legislature has declared that this scandal, which is ongoing and appears to be deepening, has severely undermined public confidence in the state's judicial system. Interbranch Commission on Juvenile Justice Act, 2009 Pa. Sess. Law 1648 (Aug. 7, 2009).

Against this backdrop, the Pennsylvania Supreme Court's refusal to review Judge Panella's actions in this case is inexplicable. Such a refusal simply compounds the perception that state courts are not level playing fields. Consequently, this case represents an ideal opportunity for this Court to provide the lower courts with guidance regarding the factors to be considered in determining whether and when due process requires recusal or disclosure. In order to preserve public confidence in state judicial systems, this Court should grant certiorari and address these important issues.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM AND DISSENTING MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA FILED JUNE 4, 2009

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1629 EDA 2008

BARBARA L. GLASOW

Appellant

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL AND HEALTH NETWORK D/B/A ST. LUKE'S OBSTETRIC & GYNECOLOGY ASSOCIATES

Appellee

No. 1734 EDA 2008

BARBARA L. GLASOW

Appellee

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL PHYSICIAN GROUP

Appellant

Appeal from the Order entered May 27, 2008
In the Court of Common Pleas of Lehigh County
Civil No. 2006-C-2210V

Appendix A

BEFORE: BENDER, PANELLA and KELLY, JJ.

MEMORANDUM: **FILED JUNE 4, 2009**

Appellant, Barbara L. Glasow, and Appellees, Joseph M. Skutches, M.D., and St. Luke's Hospital Physician Group, have cross-appealed from the order entered in the Court of Common Pleas of Lehigh County granting Appellees' motion for judgment notwithstanding the verdict.[1] After careful review, we reverse.

On March 23, 2004, Appellant had a doctor's appointment with her gynecologist, Dr. Skutches. At the appointment, Appellant complained of a lump on or near her right breast, which she had been aware of for a few years. After carefully examining the lump, Dr. Skutches diagnosed it as a sebaceous cyst and informed Appellant that the cyst would eventually break open on its own. The doctor told Appellant that if the lump became painful, she could have it lanced by Dr. Schadt, a surgeon whom she had previously seen for other breast issues, but no specific referral was made. Dr. Skutches prescribed an ultrasound for his patient, but did not tell her that it was urgent that she have it done or that the purpose of the ultrasound was to confirm his diagnosis. Appellant never took any steps to have the ultrasound done.

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1. The cross appeals were consolidated, *sua sponte*, by per curiam order dated 9/24/08. For sake of convenience, we will refer to Glasow as Appellant and Skutches as Appellee, and Skutches and St. Luke's Hospital, collectively, as Appellees.

Appendix A

Following her March 23, 2004 appointment with Dr. Skutches, the lump on Appellant's breast continued to get bigger until it finally broke open in the middle of January 2005. Thereafter, Appellant had a biopsy done by Dr. Schadt. On February 19, 2005, Appellant was informed that the lump was cancerous. The week after receiving the bad news, Appellant met with Dr. Schadt, who recommended a full mastectomy of her right breast. Given her slight frame, she was informed that the surgery would be painful and that skin closure could pose a problem.

Following her consultation with Dr. Schadt, Appellant sought the advice of Dr. Schacter, a doctor who specializes in alternative "complementary medicine." For the next couple of months, Appellant was under Schacter's care. On February 15, 2006, almost one full year after the cancer diagnosis, Appellant underwent surgery to remove the breast on which the cancerous lump was located. A second surgery was required and was performed on June 19, 2006. After her wound healed, Appellant underwent several weeks of radiation. In February of 2007, Appellant had four sessions of low dose chemotherapy. A third surgery was performed in May of 2007, and she began taking the prescription drug Herceptin in November of that year.

On August 1, 2006, Appellant filed a civil complaint against Dr. Skutches and St. Luke's Hospital, alleging that Skutches breached the applicable standard of care by not advising her to have a biopsy performed on the lump, which negligence caused a delay in diagnosis of

her cancer resulting in a decreased chance of survival. After fifteen months of discovery, a jury trial commenced on January 14, 2008.

At trial, Appellant introduced the testimony of Dr. Alan Pinshaw, qualified as an expert in obstetrics and gynecology, that Dr. Skutches breached the applicable standard of care by not informing Appellant that a biopsy of her breast mass was required. Appellant also introduced the expert testimony of Dr. Gerald H. Sokol, who testified that had the cancer been diagnosed in March of 2004, Appellant would have had a 60 to 80% chance of survival, but, because of the delay, she only had a 20 to 40% chance of survival.

Appellees offered the expert testimony of Daniel Small, M.D., who opined that because the lump was located in Glasow's breast skin as opposed to breast tissue, Dr. Skutches did not violate the standard of care by not recommending a biopsy. Dr. Small further testified that Appellant's refusal to have mammograms taken of her breast or to undergo the ultrasound prescribed by Dr. Skutches delayed the diagnosis of cancer. Mark Gittleman, M.D., testified that had an ultrasound been performed following the March 23, 2004 visit, findings suggestive of breast cancer would have been noted and, thus, the cancer would have been diagnosed more quickly. Finally, Appellees introduced the expert testimony of David Harris, M.D., who testified that even if the cancer had been diagnosed in March of 2004, Glasow's chance of survival would have only been approximately 20% within a ten-year period, no different

than the chance of survival she had after the cancer was diagnosed in February of 2005.

Following a week long trial, the jury returned a verdict in favor of Appellant for an aggregate amount of $3,973,000 for past loss of earnings, future medical expenses, future loss of earnings, and future non-economic losses. The jury found negligence on the part of both parties, allocating sixty-five percent causal negligence to the Appellees and thirty-five percent to Appellant. Accordingly, Appellant's award was reduced to $2,582,450.

Following the verdict, all parties filed post-trial motions. On May 27, 2008, the trial court entered an order granting Appellees' motion for JNOV, or in the alternative a new trial, finding that the opinions of Appellant's standard of care expert lacked the required degree of medical certainty. All other motions were denied. Subsequent to the order, the trial court issued an opinion on June 3, 2008.

Appellant filed a timely notice of appeal, seeking review of the JNOV entered in Appellees' favor, as well as the denial of her post-trial motions. Appellees filed a timely cross-appeal on June 16, 2008, alleging the trial court erred in denying the motion for JNOV on the ground that Appellant's expert testified concerning an incorrect standard of care.

On appeal, Appellant argues that the trial court erred by granting Appellees' motion for JNOV because:

(1) Appellees waived the issue by failing to object to their standard of care expert's testimony during his direct examination; (2) it was an abuse of discretion for the trial court to grant Appellees' motion for JNOV based on her expert's failing to testify to the requisite degree of medical certainty after it had previously denied their motion for a compulsory nonsuit which raised the same issue; and (3) her standard of care expert expressed his opinions with the requisite degree of medical certainty. Appellant also argues that the trial court erred by charging the jury on comparative negligence, alleging that there was no evidence of negligence on her part. Alternatively, she argues that the trial court should not have charged the jury on comparative negligence because Appellees failed to offer a logical, reasonable, or practical basis for apportionment of negligence. Finally, Appellant argues that the trial court erred by refusing to charge the jury on spoliation of records and by giving the jury an "error of judgment charge." On their cross-appeal, Appellees contend that the trial court should have also granted their alternative motion for JNOV because Appellant's standard of care expert testified concerning the wrong standard of care.

Appellant's first argument is that by failing to object during her standard of care expert's testimony, Appellees waived the issue of whether he testified to the requisite degree of medical certainty. We disagree. Generally, an objection must be made contemporaneously to an error at trial in order to preserve the issue for post-trial relief. "If no objection is made, error which could have been corrected . . . during trial by timely objection may not

constitute a ground for post-trial relief." Pa.R.C.P. 227.1(b)(1), *Note.* Here, the issue raised by Appellees in their post-trial motion was not an issue that could have been corrected during trial. If, as Appellant alleges,[2] Appellees' motion for JNOV had been based on an evidentiary ruling, the issue would have been waived for failure to object because such error could have been rectified at trial. However, Appellees' motion was based not on an evidentiary ruling, but, rather, on the allegation that Appellant's evidence of negligence, including Dr. Pinshaw's testimony, was insufficient to show that Dr. Skutches breached the applicable standard of care. A defendant does not have to object to ensure that an opposing party's witness testifies with the certainty required to establish a prima facie case of medical malpractice. Accordingly, we find that Appellees did not waive the issue.[3] ***See Griffin v. Univ. of Pitt. Med. Ctr.***, 950 A.2d 996 (Pa. Super. 2008) (addressing argument that expert's opinions were not offered with required degree of medical certainty despite no mention in opinion of whether defendants objected to the testimony at trial); ***Corrado v. Thomas Jefferson Univ. Hosp.***, 790 A.2d 1022 (Pa. Super. 2001) (finding issue of

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2. (*See* Appellant's Brief, at 20).

3. We note that Appellant cites no case authority for the proposition that a defendant must object contemporaneously to expert testimony as lacking the requisite certainty in order to preserve the right to request a nonsuit based on the plaintiff's failure to establish a prima facie case of medical malpractice. Rather, Appellant merely cites cases which echo the general sentiment expressed in Pa.R.C.P. 227.1(b)(1), *Note.*

whether trial court erred in considering evidence offered by defendants during plaintiff's case in chief waived for failure to object, while addressing claim expert did not testify with required degree of medical certainty despite no mention in opinion of whether defendants objected to the testimony at trial).

Appellant's next argument is that it was an abuse of discretion for the trial court to grant Appellees' motion for JNOV based on her expert's testimony not being offered with sufficient medical certainty, after it had previously denied Appellees' motion for a compulsory nonsuit which raised the same issue during trial. We disagree. This Court "will reverse a trial court's grant or denial of a judgment notwithstanding the verdict [ ] when we find an abuse of discretion[.]" ***Campisi v. Acme Markets, Inc.***, 915 A.2d 117, 119 (Pa. Super. 2006) (citation omitted). "An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." ***Cave v. Wampler Foods, Inc.***, 961 A.2d 864, 868 (Pa. Super. 2008) (citation omitted). Here, we find no evidence that the trial court was motivated by partiality, prejudice, bias, or ill will simply because it initially denied Appellees' motion for compulsory nonsuit during trial when it did not have the opportunity to review the transcript of Dr. Pinshaw's testimony, and then subsequently granted the motion

for JNOV after trial when it was able to consider more carefully the substance of the expert's testimony.[4]

Appellant's next argument is that the trial court erred in finding that her standard of care expert's testimony lacked the requisite degree of medical certainty. After careful review, we agree.

> A [judgment n.o.v.] can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for [judgment n.o.v.], we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict . . . . Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact . . . . A [judgment n.o.v.] should be entered only in a clear case.

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4. Again, we note that Appellant does not cite any case in which an appellate court found an abuse of discretion based on a trial court's denying a motion for compulsory nonsuit then subsequently granting a motion for JNOV raising the same issue.

Cruz v. Northeastern Hosp., 801 A.2d 602, 607 (Pa. Super. 2002) (citation omitted). This Court has made clear that "[t]he entry of judgment notwithstanding the verdict (JNOV) is a drastic remedy; a court cannot lightly ignore the findings of a duly selected jury." ***Burton-Lister v. Siegel, Sivitz and Lebed Associates***, 798 A.2d 231, 236 (Pa. Super. 2002), *appeal denied*, 808 A.2d 568 (Pa. 2002). Finally,

> [I]n order to determine the propriety of a decision granting judgment n.o.v. we must determine whether there was sufficient competent evidence to sustain the verdict, granting the verdict winner the benefit of every reasonable inference that can reasonably be drawn from the evidence and rejecting all unfavorable testimony and inferences. We will not reverse the trial court's decision absent the demonstration of either an abuse of discretion or an error of law.

Gorski v. Smith, 812 A.2d 683, 698 (Pa. Super. 2002) (citation omitted), *appeal denied*, 856 A.2d 834 (Pa. 2004).

To establish a prima facie case of medical malpractice, Appellant was required to offer expert testimony concerning the standard of care to which Dr. Skutches was required to adhere. "[W]here the circumstances surrounding the malpractice claim are beyond the knowledge of the average layperson . . . the plaintiff is [ ] required to present an expert witness who

will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered." ***Vicari v. Spiegel***, 936 A.2d 503, 510 (Pa. Super. 2007) (citations and internal quotation marks omitted)

> In determining whether the expert's opinion is rendered to the requisite degree of certainty, we examine the expert's testimony in its entirety. That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty. Accordingly, an expert's opinion will not be deemed deficient merely because he or she failed to expressly use the specific words, reasonable degree of medical certainty.

Id. (citations and internal quotation marks omitted). This Court has held that "reasonable degree of medical certainty" requires more than offering an opinion as to what was more likely than not. ***See Corrado, supra*** at 1031 (finding expert did not testify with requisite degree of medical certainty when he testified that "more likely than not in my opinion [the defendant doctor] deviated from the standard of care.").

Here, during his direct examination, Appellant's standard of care expert, Dr. Pinshaw, was asked to describe the routine he generally follows when retained

to testify as an expert in medical malpractice cases. The witness described the process he normally employs, and concluded by stating "I try and reach a conclusion that speaks to a reasonable medical certainty, which means more likely than not[.]" (N.T., 1/16/08, at 103). Appellant's counsel then asked the expert: "Well, is it more likely than not, or is it to a reasonable medical certainty?" (***Id.***). The expert responded: "It's the same thing in my opinion." (***Id.***).

Following this line of questioning, Appellant's counsel directed his expert's testimony to the instant case. "With regard to the opinions you rendered in this case, can you tell me what opinions you rendered and why you rendered them?" (***Id.***). The expert responded: "I had in the instance, one central opinion, and that is that on March 23, 2004, when Barbara Glasow complained of a lump in her breast and sought medical attention, as a consequence of that encounter, a biopsy — and I'll explain what that is in a moment — **needed** to be taken." (***Id.***) (emphasis added). He further explained that

> This opinion is based on the fact that for many years now, certainly longer than I've been in practice, it has been known that examining a breast lump, although you may have an idea what you think it is and that it is malignant or nonmalignant, that's the bottom line.

Appendix A

> You can form an opinion if you wish, but you are **mandated** to check the opinion by testing the tissue.
>
> We all have our suspicions. "I don't think this is malignant" or "This looks malignant." You **need** to go to the tissue and have a look at it . . .

(***Id***, at 105) (emphasis added). At another point in the testimony, the expert asserted that "[o]n that day, that lesion **needed** to be [biopsied] . . . That abnormality **needed** to be biopsied." (***Id.*** at 111) (emphasis added). Appellant's counsel later asked Dr. Pinshaw: "If you don't tell that to a patient that you need to get a biopsy, is that a violation of the standard of care?" The expert definitively responded: "It is." (***Id.*** at 113). Finally, the expert was asked "do you firmly hold those opinions, the ones you testified to," to which he responded, "Yes." (***Id***. at 115).

After carefully reviewing Dr. Pinshaw's testimony in its entirety, we conclude that the trial court erred in finding that the expert's opinions regarding the standard of care were not offered with the requisite degree of medical certainty. Although the testimony includes a definition of medical certainty at odds with established case law, a complete reading of the testimony establishes that his opinion concerning the need for a biopsy of Appellant's breast tissue when Dr. Skutches

examined her on 3/23/04 was offered with sufficient medical certainty.[5] ***See Griffin, supra***, at 1000 ("That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty."). Just as the mere utterance of the magic words "reasonable degree of medical certainty" does not automatically render expert testimony legally sufficient, ***see Griffin, id.***, at 1001-02, we find that the mere fact Dr. Pinshaw prefaced his testimony with a faulty definition of "reasonable degree of medical certainty" did not render the remainder of his testimony legally insufficient. Rather, we find that the expert's repeated use of definitive terms with regard to the necessity for a biopsy of Appellant's breast lump clearly establishes that his opinions were offered with sufficient medical certainty. Therefore, we vacate the trial court's order granting Appellees' motion for JNOV.

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5. The trial court asserts that after Dr. Pinshaw gave his opinion as to the definition of reasonable degree of medical certainty, "[a]ll opinions that followed, no matter how strongly worded, were based on an inappropriate degree of certainty. Dr. Pinshaw limited his testimony to 'more likely than not' by giving his own meaning to the phrase 'reasonable degree of medical certainty.'" (Trial Ct. Op.,. 6/3/08, at 12). We disagree. When addressing whether the standard of care called for a biopsy, Dr. Pinshaw stated, *inter alia*, that a biopsy was "mandated." (***See*** N.T., 1/16/08, at 105). It is simply illogical to conclude that Dr. Pinshaw intended to qualify the term "mandated" with his definition of medical certainty, more likely than not. Something either is or isn't mandated; it cannot be "more likely than not mandated." Accordingly, we disagree with the trial court's logic.

Both the trial court and Appellees rely on ***Corrado***, ***supra***, in support of the JNOV. We find that the case is distinguishable on the facts. In ***Corrado***, the plaintiff's standard of care expert repeatedly qualified his responses to specific questions concerning whether the defendant doctor breached the standard of care with the phrase "more likely than not." ***See Corrado***, ***supra*** at 1031 ("more likely than not in my opinion he deviated from the standard of care;" "more likely than not [the decedent] would have responded to treatment."). On appeal, this Court found that the expert did not express the requisite degree of medical certainty. ***See id.*** Here, to the contrary, Dr. Pinshaw only used the phrase "more likely than not" when asked in the abstract what he believed to be the definition of reasonable degree of medical certainty. When he was subsequently asked specific questions concerning whether Dr. Skutches breached the standard of care by failing to biopsy the lump, Pinshaw offered certain, definitive statements in the affirmative. (***See*** N.T., 1/16/08, at 103, 105, 113). Accordingly, ***Corrado*** is not controlling.

Our task is not complete, as there are several other issues raised before us which we need resolve. Appellant's next argument is that the jury should not have been charged on comparative negligence because Appellees did not offer any evidence of negligence on her part. We disagree.

Appendix A

The standard of review of a jury charge is well settled:

> Our standard of review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error of law which controlled the outcome of the case.
>
> Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error. In reviewing a trial court's charge to the jury we must look to the charge in its entirety.

Underwood ex rel. Underwood v. Wind, 954 A.2d 1199, 1204 (Pa. Super. 2008) (citation omitted).

> The purpose of a jury charge is to clarify the legal principles at issue. A jury instruction will be upheld if it accurately reflects the law and is sufficient to guide the jury in its deliberations. A trial judge is bound to charge the jury only on the law applicable to the factual parameters of a particular case and it

> may not instruct the jury on inapplicable legal issues.

Cruz, supra at 611 (citations omitted).

The law with regard to comparative negligence is equally well settled.

> **[A]ny evidence** of contributory negligence mandates submission of the issue to the jury. Nevertheless, the burden to establish the plaintiff's conduct as a contributing factor in his injury rests with the defendant, who must show both the negligence of the conduct alleged and the causal relationship of that conduct to the injuries for which damages are sought. Our Courts have distilled these elements as follows:
>
> > Contributory negligence is conduct on the part of a plaintiff which falls below the standard [of care] to which he should conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant, in bringing about the plaintiffs harm. Contributory fault may stem either from a plaintiff's careless exposure of himself to danger **or from his failure to exercise reasonable diligence for his own protection.**

Appendix A

Angelo v. Diamontoni, 871 A.2d 1276, 1280-81 (Pa. Super. 2005) (citations omitted) (emphasis added).

Here, we find that the trial court did not err in charging the jury on comparative negligence. At trial, Appellees offered the testimony of Dr. Daniel Small that "mammograms are extremely effective in diagnosing breast cancer." (N.T., 1/16/08, at 161). There was also testimony that due to the pain they caused her, Appellant stopped having mammograms performed in April of 2001. (***See*** N.T., 1/15/08, at 50, 104). Finally, there was expert testimony that previous mammograms taken on Appellant's breast were "quite helpful,' that "they were still able in 2001 to get perfectly good pictures [of] her left breast," and that "[i]f mammograms had been done on a yearly basis, the way that they're recommended [for] women over the age of 40, this breast cancer would have been diagnosed in my opinion." (**See** N.T., 1/16/08, at 162, 163, 161). Appellees also adduced evidence that had an ultrasound been performed the cancer would have been diagnosed, (***see*** N.T., 1/16/08, at 165, 166, 198), and that Appellant failed to have an ultrasound performed despite discussing the need for the procedure with Dr. Skutches in January of 2003, (**see** N.T., 1/15/08, at 104-07), and despite the fact that he prescribed one during his March 23, 2004 examination of Appellant's breast.[6] (***See id.*** at

6. The theory of Appellant's case was a decreased chance of survival from the time she was examined by Dr. Skutches on March 23, 2004, to the time the cancer was finally diagnosed in February of 2005. Accordingly, the evidence adduced at trial (Cont'd)

64; N.T., 1/18/08, at 48, 49). Although Appellant presented evidence to counter Appellees' claim that she was negligent, including Dr. Skutches' admission that he did not inform her during the 3/24/04 appointment that the purpose of the ultrasound was to rule out cancer, (***see*** N.T., 1/18/08, at 71), and her testimony that the purpose of the ultrasound prescription was to determine whether her insurance carrier would cover the test, (***see***

(Cont'd)

concerning Appellant's decision to initially delay mastectomy and chemotherapy, and, instead, undergo "complementary medicine," was irrelevant for purposes of contributory negligence. While Appellees do not allege in their brief that Appellant's negligence included her decision to delay surgery and chemotherapy, (***see*** Appellees' Brief, at 29), we note that in Defense counsel's closing arguments, he clearly argued to the jury that Appellant was negligent for her treatment decisions after the cancer diagnosis. (***See*** N.T., 1/18/08, at 187-88). On appeal, Appellant does not allege that the trial court erred in admitting the evidence concerning her post-diagnosis treatment decisions and that a new trial should be granted on that basis; rather, Appellant simply notes in her brief that such evidence was irrelevant, and then incorrectly asserts that Appellees offered no other evidence of contributory negligence. (***See*** Appellant's Brief, at 36). Accordingly, the issue is waived. ***See*** Pa.R.A.P. 2119(a); ***Lackner v. Glosser***, 892 A.2d 21, 29-30 (Pa. Super. 2006) ("arguments which are not appropriately developed are waived."). We also note that Appellant's counsel did not object during Defense counsel's closing argument. Accordingly, the issue is also waived on that basis, as this is the type of error which could have been corrected by the trial court.. ***See*** Pa.R.C.P. 227.1(b)(1), *Note* ("If no objection is made, error which could have been corrected . . . during trial by timely objection may not constitute a ground for post-trial relief.").

N.T., 1/15/08, at 64, 107), the trial court was required to charge the jury on the issue because Appellees offered evidence of contributory negligence. Accordingly, the trial court did not err in charging the jury on comparative negligence.

Appellant relies upon ***Diamontoni***, ***supra***, for her contention that there was no evidence of negligence on her part. In that case, a twenty-three year old man went to his doctor complaining of vomiting, blurred vision, dry mouth, lightheadedness, and inability to work. ***Id.*** at 1278. The doctor noted that the patient had a family history of diabetes and suggested that he obtain a fasting blood draw, but did not prescribe a random blood sugar screening. ***Id.*** The doctor diagnosed the patient with influenza. ***Id.*** Less than one month after this initial visit, the patient returned to his doctor's office complaining of nausea and vomiting. ***Id.*** This time, the doctor diagnosed the patient with gastroenteritis and again sent him home, where he died the following day of diabetic ketoacidosis. ***Id.*** At the medical malpractice trial which followed, the court charged the jury on comparative negligence. ***Id.*** The jury found that the plaintiff was more than 50% contributorily negligent. ***Id.*** On the plaintiff's appeal, the doctor argued that the decedent's failure to monitor his own health coupled with his failure to obtain a fasting blood draw justified the charge. ***Id.*** at 1281. This Court disagreed and vacated the judgment, finding that because the doctor had not attached any urgency to his suggestion that plaintiff obtain a fasting blood draw, the plaintiff had not been contributorily negligent for failing to have the procedure done. ***Id.*** at 1282.

Appendix A

The instant case is distinguishable from ***Diamontoni.*** Here, Appellant did not go to a doctor for an unknown illness and then simply fail to undergo a procedure suggested by her doctor. Rather, Appellant went to her doctor for the specific purpose of determining whether a lump on her breast was cancerous, and, after being informed by her doctor that he did not think it was cancerous but that she should nevertheless have an ultrasound, she opted against having the test done. Although Dr. Skutches did not specifically tell her that the purpose of the ultrasound was to confirm his diagnosis, Appellant was aware that ultrasounds are relied upon to check for cancer, the specific disease she was worried about. Additionally, Appellant had consistently refused to undergo mammograms and ultrasounds prior to her March 23, 2004 visit with Appellee, tests which could have helped diagnose her disease while still in its early stages. This evidence was sufficient for the charge on comparative negligence. Accordingly, Appellant's argument is without merit.

Appellant next argues that the charge on comparative negligence was improper because Appellees offered no expert testimony regarding the extent to which her alleged negligent conduct contributed to the delay in her cancer diagnosis. We disagree. At trial, Appellant's own causation expert testified that the delay in diagnosis resulted in her chance of survival dropping from 60-80% to 20-40%. (***See*** Appellant's Exhibit 7 D, Video Deposition of Gerald H. Sokol, M.D., 1/12/08, at 02334-02336) (played for jury

at trial on 1/16/08 and 1/17/08). Although Appellees offered evidence that the delay in diagnosis did not result in any decreased chance of survival, (***see*** N.T., 1/17/08, at 148), they were also free to argue the alternative theory that if there was a decreased chance of survival, it was due to Appellant's own negligence. As the trial court aptly explained, Appellees "claimed that the delay in diagnosis created no meaningful difference in [Appellant's] prognosis, but, if it did, the [Appellant] herself must share the blame." (Trial Ct. Op., 6/3/08, at 17). We find that the jury could consider the causation evidence offered by Appellant in finding that her own negligence contributed to her decreased chance of survival.

Appellant next argues that the jury should not have been charged on contributory negligence because Appellees failed to provide a logical, reasonable, or practical basis for apportionment of negligence. In support of her argument, Appellant relies on product liability cases in which this Court has found that an expert is required to apportion causation. (***See*** Appellant's Brief, at 36-37) (citing ***Lee v. Pittsburgh Corning Corp.***, 616 A.2d 1045 (Pa. Super. 1992); ***Martin v. Owens-Corning***, 528 A.2d 947 (Pa. 1987); ***Glomb v. Glomb***, 530 A.2d 1362 (Pa. Super. 1987), *appeal denied*, 538 A.2d 876 (Pa. 1988)). However, allocation of liability under our comparative negligence statute[7] is an entirely distinct issue from apportionment of harm to causes under the Restatement (Second) of Torts. In fact, our

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7. 42 Pa.C.S.A. § 7102.

research has revealed no legal authority supporting Appellant's contention that Appellees were required to produce expert testimony to allow the jury to allocate negligence. Rather, it seems clear that under our comparative negligence statute, it is within the jury's province as finder of fact to weigh all evidence of negligence and allocate liability accordingly.

Appellant's next argument is that the trial court erred by refusing to charge the jury on spoliation of records. Specifically, Appellant contends that the trial court should have charged the jury in accordance with Pa. Standard Jury Instruction 5.06(CIV), which states in part: "if you find that there was an intentional alteration or destruction of medical records by the defendant[s] in this case, and that there has been no satisfactory explanation for the alteration or destruction, you may infer that the records or portions of records so altered or destroyed would have been unfavorable to the defendant[s]." We disagree.

"When examining jury instructions, our scope of review is to determine whether the trial court committed a clear abuse of discretion or an error of law controlling the outcome of the case." ***Gorski***, ***supra*** at 697. As noted above, "[t]he purpose of a jury charge is to clarify the legal principles at issue. A jury instruction will be upheld if it accurately reflects the law and is sufficient to guide the jury in its deliberations." ***Cruz***, ***supra*** at 611 (citations omitted).

Appendix A

The basis for the requested spoliation charge was evidence adduced at trial that subsequent to Dr. Skutches' examination of Appellant, he made a note in his records that he recommended Appellant see Dr. Schadt. The jury was clearly apprised that the transcription occurred after Dr. Skutches learned that Appellant's breast lump had been diagnosed as malignant cancer. (***See*** N.T., 1/18/08, at 52). The evidence also clearly indicated that Dr. Skutches wrote the note with a different colored pen than the one he used to make the original entry, (***see id.*** at 64), that he circled the note, (***see id.*** at 52), and that the note did not overwrite or obscure the original entry in any way. (***See id.*** at 61). Accordingly, the only thing that was altered was a blank piece of paper; thus, there was simply no need for the jury to infer anything. We therefore find that the trial court did not commit an abuse of discretion by refusing to charge the jury in accordance with Pa. Standard Jury Instruction 5.06(CIV).

Appellant's final argument is that the trial court committed an abuse of discretion when it charged the jury that "[t]o be responsible for the harm to [Appellant], [Appellee] must make more than a mere error in judgment. The error must be negligent, and the negligence must be an actual cause of harm to [Appellant]." (N.T., 1/18/08, at 209). Appellant argues that the charge was error because Pa. Standard Jury Instruction 11.01 does not include "a charge on the professional judgment exception[.]" ***See*** Pa. Standard Jury Instruction 11.01, subcommittee notes. We disagree.

Although the trial court did not follow this standard jury instruction, it was not required to do so. Our Supreme Court "has never adopted the Pennsylvania Suggested Standard Jury Instructions, which exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." ***Jeter v. Owens-Corning Fiberglas Corp.***, 716 A.2d 633, 636 (Pa. Super. 1998). (citing ***Commonwealth v. Smith***, 694 A.2d 1086, 1094 n.11 (Pa. 1997)). In fact, "[t]his Court has granted trial courts broad discretion in phrasing a jury charge. Our main concern is that the charge clearly, adequately, and accurately presents the law to the jury for its consideration." ***Commonwealth v. Collins***, 810 A.2d 698, 701 (Pa. Super. 2002) (citations omitted). Accordingly, Appellant is not entitled to relief simply because the trial court deviated from the proposed standard jury instruction.

Appellant also relies on ***Gunn v. Grossman***, 748 A.2d 1235 (Pa. Super. 2000), *appeal denied*, 764 A.2d 1070 (Pa. 2000), for the proposition that the trial court should not have charged the jury on "error in judgment." In ***Gunn***, this Court found that despite the trial court's refusal to charge the jury on "error in judgment," the defendant doctor was not entitled to a new trial. However, contrary to Appellant's representation of the case, this Court did not decree that trial courts should never charge a jury on "error in judgment." Rather, it found that the charge which had been given sufficiently informed the jury about the law of negligence and, thus, that the appellant doctor was not entitled to a new trial based on the court's refusal to charge the jury on "error

in judgment." ***Id.*** at 1244. Therefore, ***Gunn*** does not compel us to find that the trial court erred by charging the jury on "error in judgment."

In ***Havasy v. Resnick***, 609 A.2d 1326 (Pa. Super. 1992), this Court expressly approved the "error in judgment" jury charge. ***Id.*** at 1335-36. Since ***Havasy*** was decided, neither this Court nor our Supreme Court has overruled ***Havasy*** and found that the charge amounts to *per se* error. Admittedly, this Court has "expressed reservations about the continued vitality of" the charge. ***See Tindall v. Friedman***, 2009 WL 763387, *15 (Pa. Super. 2009). Specifically, we have noted that "except in the rarest of cases, the 'error in judgment' charge is much more likely to confuse than clarify." ***D'Orazio v. Parlee & Tatem Radiologic Associates, Ltd.***, 850 A.2d 726, 729 (Pa. Super. 2004). Nevertheless, this Court has repeatedly affirmed trial courts' use of the charge. ***See Blicha v. Jacks***, 864 A.2d 1214, 1219-20 (Pa. Super. 2004); ***King v. Stefenelli***, 862 A.2d 666, 671 (Pa. Super. 2004) (noting "[t]he law has long been that a physician is not liable for an error of judgment if that physician employs the required judgment and care"); ***Schaaf v. Kaufman***, 850 A.2d 655, 666 (Pa. Super. 2004), *appeal denied*, 872 A.2d 1200 (Pa. 2005). Unless and until our Supreme Court finds otherwise, we are compelled to follow the long line of cases which have affirmed trial courts' use of the "error in judgment" charge.

Although we have found that the trial court's charge was not error simply because it mentioned "error in

judgment," we still must determine whether, as given, "the charge clearly, adequately, and accurately present[ed] the law to the jury for its consideration." ***Collins***, ***supra*** at 701. Here, in addition to the "error in judgment" point, the trial court charged the jury, *inter alia*, that:

> [P]rofessional negligence consists of a negligent, careless, or unskilled performance by a physician of the duties imposed [on] him by the professional relationship with the patient. It is negligence when a physician shows a lack of proper care and skill in the performance of a professional act. A physician must have the same knowledge and skill and use the same care normally used in the medical profession.
>
> A physician whose conduct does not meet the professional standard of care is negligent. A physician must also keep informed of the contemporary developments in the medical profession, and must use current skills and knowledge.

(N.T., 1/18/08, at 210). Read as a whole, we find that the charge accurately explained that to find Dr. Skutches liable for negligence, the jury had to conclude that he deviated from the appropriate standard of care. Accordingly, the trial court's jury charge did not amount to an abuse of discretion.

Having disposed of all of Appellant's issues on appeal, we now turn to Appellees' cross-claim that the trial court should have granted their motion for JNOV because Appellant's standard of care expert testified concerning the wrong standard of care. Specifically, Appellees argue that the expert testified about the standard of care applicable to surgeons rather than the standard of care applicable to doctors who specialize in obstetrics and gynecology. Appellant argues that the issue was waived by Appellees' failure to object during the expert's testimony. We disagree that the issue was waived, as Appellees properly preserved the issue by raising the sufficiency of Appellant's evidence in their post-trial motion and then addressing the issue at length in their brief in support of the motion.[8] However,

8. We note our astonishment that the trial court found this issue waived based on Appellees' failure to object when the testimony was being offered, yet found that the issue of whether the expert's testimony was offered with sufficient certainty was not waived for lack of objection at trial. (*See* Trial Ct. Op., 6/3/08, 14-15). Although Appellant did not specifically allege in her Brief in Opposition to Appellees' Motions for Post-Trial Relief that the issue regarding the certainty of Dr. Pinshaw's testimony was waived due to Appellees' failure to object, as she did with regard to the proper standard of care testimony issue, Appellant certainly alluded to waiver by noting that "the trial judge, during the testimony of Dr. Pinshaw, was never alerted to any claim that the testimony of Appellant's expert was insufficient as a matter of law." (*See* Appellant's Brief in Opposition to Appellee's Motion for Post-Trial Relief, at 8). Furthermore, in her answer to Appellees' Motion for Relief, Appellant alleged that "[Appellees] seek to allege unspecified

(Cont'd)

we find that the testimony concerned the proper standard of care.

At trial, Appellant's expert was qualified as an expert in obstetrics and gynecology. During his testimony, the expert was asked to explain the basis for his opinion. The expert responded: "this is based on a very old and well-established surgical principle that a breast mass —" (N.T., 1/16/08, at 104). Before the expert could finish his sentence, Defense counsel lodged an objection, which was sustained. Thereafter, the expert

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(Cont'd)

other reasons as to why their motion should be granted, however, to the extent such objections were not raised at the time of trial, same are waived . . . It is specifically denied that [Appellees] preserved their claims with timely Motions and/or **Trial Objections** as apparently some [Appellees] Objections are being raised for the first post trial [sic]." (***See*** Appellant's Opposition to Appellees' Motion For Post Trial Relief, Cross-Motion for Judgment Notwithstanding the Verdict and Cross-Motion for Post Trial Relief Pursuant to Rule 227.1(c), at ¶¶ 6-7) (emphasis added). Therefore, it seems clear that the issue of whether Appellees waived their claim regarding the certainty of Appellant's expert testimony was brought to the trial court's attention and that it either implicitly rejected the issue or simply chose not to address it. In any event, we find that the ultimate issue addressed in both claims was identical: whether Appellant's evidence, including Dr. Pinshaw's testimony, established a prima facie case of medical malpractice. As we have already explained, because neither claim was premised on alleged error in the trial court's admitting the testimony, Appellees were not required to contemporaneously object to the testimony in order to preserve either claim. ***See*** above at 7-9.

rephrased his answer, explaining the basis for his opinion without any further reference to surgical principles. We find that this lone reference to surgical principles does not support Appellees' argument that the expert testified to the standard of care applicable to surgeons rather than the relevant standard of care applicable to obstetrician gynecologists. Accordingly, we reject Appellees' claim.

Order reversed. Case remanded to trial court with instructions to enter judgment in favor of Appellant for the damages determined by the jury, reduced by the amount of contributory negligence allocated to Appellant. Jurisdiction relinquished.

Bender, J. files a Dissenting Memorandum.

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1629 EDA 2008

BARBARA L. GLASOW

Appellant

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL AND HEALTH NETWORK D/B/A ST. LUKE'S OBSTETRIC & GYNECOLOGY ASSOCIATES

Appellee

No. 1734 EDA 2008

BARBARA L. GLASOW

Appellee

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL PHYSICIAN GROUP

Appellant

Appeal from the Order entered May 27, 2008
In the Court of Common Pleas of Lehigh County
Civil No. 2006-C-2210V

Appendix A

BEFORE: BENDER, PANELLA and KELLY, JJ.

DISSENTING MEMORANDUM BY BENDER, J.:
FILED JUNE 4, 2009

I respectfully dissent. After considering the totality of his testimony, I conclude that Appellant's standard of care expert, Dr. Pinshaw, failed to express his opinion to the requisite degree of medical certainty, thereby creating a void in Appellant's prima facie case and entitling Appellees to judgment notwithstanding the verdict. Upon commencing his testimony, on direct examination, Dr. Pinshaw indicated that his opinions were submitted with a "reasonable degree of medical certainty"; however, critically, he revealed his misunderstanding of that requisite legal standard by defining it as "more likely than not." ***See*** N.T. Trial, 1/16/08, at 103. Specifically, Dr. Pinshaw stated initially that, in each case, he tries to "reach a conclusion that speaks to a reasonable medical certainty, which means more likely than not", and he reiterated his understanding that both the "reasonable medical certainty" and "more likely than not" standards were "the same thing". ***Id.*** Thus, I agree with the trial court that every opinion thereafter voiced by Dr. Pinshaw (i.e., that Dr. Skutches breached the applicable standard of care by failing to order a biopsy) was, actually, expressed only to a more likely than not degree of medical certainty. An expert opinion rendered to a more likely than not degree of certainty is insufficient in a medical malpractice case. ***Corrado v. Thomas Jefferson Univ. Hosp.***, 790 A.2d 1022, 1031 (Pa. Super. 2001).

APPENDIX B — OPINION OF THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA, CIVIL DIVISION FILED JUNE 3, 2008

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA CIVIL DIVISION

Case No.: 2006-C-2210V

BARBARA GLASOW,

Plaintiff,

vs.

JOSEPH M. SKUTCHES, M.D., and ST. LUKE'S PHYSICIAN GROUP,

Defendants.

OPINION

CAROL K. McGINLEY, J.

Joseph M. Skutches, M.D. and St. Luke's Hospital and Health Network request judgment not withstanding the verdict, or in the alternative, a new trial. Barbara Glasow filed a Cross-Motion for Judgment Not Withstanding the Verdict and Cross-Motion for Post-trial Relief.

Appendix B

Following jury trial in this medical malpractice case from January 14, 2008 to January 18, 2008, the jury found Defendants 65% negligent, and Plaintiff 35% contributorily negligent. The verdict of $3,973,000, if molded for the Plaintiff's contributory negligence, results in damages totaling $2,582,450.

FACTS

Ms. Glasow scheduled an appointment with her gynecologist, Dr. Skutches, in order to have a lump on the edge of her breast examined. At that appointment, on March 23, 2004, Dr. Skutches examined the lump by looking at it carefully, feeling the breast and the lump. (N.T. January 15, 2008, pp. 60-61). Dr. Skutches determined that the lump was a sebaceous cyst and told Ms. Glasow there was nothing to worry about, that it would eventually break and reveal white cheesy matter. (N.T. January 15, 2008, p. 61). Dr. Skutches explained that she could have it lanced by Dr. Schadt, a surgeon who she had previously seen for other breast issues, if the lump was uncomfortable, but no specific referral was made for Ms. Glasow to see Dr. Schadt. (N.T. January 15, 2008, p. 63).

Ms. Glasow had previously voiced her refusal to have mammograms done after feeling she was physically unable to maneuver in the mammography machine, which resulted in a pinching of her spinal cord. (N.T. January 15, 2008, p. 50). A notation had been made in her file during her prior annual exam in January of 2003, for a breast ultrasound next year. (N.T. January 15, 2008, p. 107).

Appendix B

During the March 23, 2004 appointment, Dr. Skutches gave Ms. Glasow a prescription for an ultrasound of her breasts. (N.T. January 15, 2008, p. 64). However, Ms. Glasow did not take any steps to have the ultrasound done. (N.T. January 15, 2008, p. 152). An ultrasound would have revealed that the diagnosis of sebaceous cyst was questionable. (N.T. January 16, 2008, pp. 165, 166, 198); (Defendant's Exhibit 9, Videotaped Deposition of Mark Gittleman, M.D., January 17, 2008, pp. 30-31, 33-35).

Following the March 23, 2004 appointment, the lump continued to get bigger and in the middle of January 2005, the lump broke open and was bloody, raw and weepy. (N.T. January 15, 2008, pp. 65-66). Ms. Glasow made an appointment with Dr. Schadt who biopsied the lump. On February 19, 2005, Ms. Glasow received the pathology results that the lump was poorly differentiated adenocarcinoma, i.e. cancer. (N.T. January 15, 2008, p. 69).

The following week, Ms. Glasow had a follow-up meeting with Dr. Schadt who recommended a full mastectomy on the right side. (N.T. January 15, 2008, p. 75). In addition, Ms. Glasow had a consultation with Dr. Ansanelli, a breast surgeon with a specialty in lasers and Dr. Elliot Friedman, an oncologist.

Ms. Glasow did not accept any of the recommendations from the time she was diagnosed in February of 2005 through August 2005. (N.T. January 15, 2008, p. 154). The only treatment she accepted was

with Dr. Schachter, a doctor of complementary medicine. (N.T. January 15, 2008, p. 154).

Although surgery had been recommended soon after the diagnosis of cancer, Ms. Glasow did not choose to undergo surgery until February 15, 2006, a year after the diagnosis. (Plaintiff's Exhibit 7 D, Video Deposition of Gerald H. Sokol, M.D., January 12, 2008, p. 02297). She had a second surgery on June 19, 2006. (*Id.* at 02311). After the wound healed she had a course of several weeks of radiation at the Cancer Treatment Centers of America. (N.T. January 15, 2008, pp. 90-91). In February of 2007, Ms. Glasow had four sessions of low dose chemotherapy. A third surgery was performed in May of 2007. (N.T. January 17, 2008, p. 145). Ms. Glasow began Herceptin in November of 2007. (N.T. January 15, 2008, p. 156).

Plaintiff provided the following causation testimony from her expert, Gerald H. Sokol, M.D.:

> If it had been diagnosed, and indeed this was a movable lesion as Ms. Glasow and the defendant physician, Dr. Skutches have testified, then this could well have been T-1 or a T-2 lesion without lymph nodes being involved. That means at that time she could well have had a cure rate anywhere from 60 to 80 plus percent.
>
> I understand that the nature of the lesion is somewhat nebulous, but if indeed that is the

case, then she had a certainly a better than even chance of being cured of her cancer with standard treatment, with just lumpectomy and radiation therapy.

Because it was estrogen receptor positive, she might have received — she might have received any of the agents that she ultimately took, Femara, Tamoxifen or Raloxifene, Arimidex, agents that she sought during the course of her disease. And she still likely would have had a better than even chance of being cured.

As it is now, of course, with disease in the liver and bone, she's not a candidate for cure. And when she presented with her cancer after the alleged 11 month delay, she had had an already very clear cut skin invasion and an invasion actually into the chest wall itself.

So at that time, even without knowing the subsequent history, the prognosis for curative treatment dropped to perhaps 20, 30, at best 40 percent. So she lost a significant chance for survival.

(Plaintiffs Exhibit 7 D, Video Deposition of Gerald H. Sokol, M.D., January 12, 2008, pp. 02334-02336).

Dr. Daniel Small, M.D. testified on behalf of Defendants. He testified that Plaintiff's reluctance or

refusal to have mammograms or the ultrasound prescribed by Dr. Skutches conducted delayed the diagnosis of breast cancer. (N.T. January 16, 2008, pp. 161, 164, 165, 166, 198).

Similarly, Dr. Mark Gittleman, M.D. testified on behalf of Defendants and also opined, "that had an ultrasound been performed following that March 2004 visit with Dr. Skutches, that findings suggestive of a breast cancer would have been noted and, therefore, would have been diagnosed shortly thereafter or at least hopefully would have been diagnosed shortly thereafter." (Defendant's Exhibit 9, Videotaped Deposition of Mark Gittleman, M.D., January 17, 2008, p. 40).

In addition, Dr. David Harris, M.D. opined that had Ms. Glasow followed through with the prescribed ultrasound, the cancer would have been diagnosed in the Spring of 2004. (N.T. January 17, 2008, pp. 143, 144). Dr. Harris further testified that even if the cancer would have been found at that time, Ms. Glasow's prognosis was approximately a 20% chance of survival within a ten-year period. (N.T. January 17, 2008, p. 148). As of February 15, 2005, the date the cancer was diagnosed, her chances of survival were also in the 20% range. (N.T. January 17, 2008, pp. 148-149, 190).

Appendix B

STANDARD OF REVIEW

Judgment notwithstanding the verdict is the proper remedy in a civil case where the evidence is insufficient to sustain the verdict of the trial court. *Boutte v. Seitchik*, 719 A.2d 319 (Pa. Super. 1998). There are two bases upon which a judgment notwithstanding the verdict can be entered: (1) the movant is entitled to judgment as a matter of law, in which case a court concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his or her favor; and (2) the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant, in which case the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure. *Rohm and Haas Co. v. Continental Cas. Co.*, 566 Pa. 464, 781 A.2d 1172 (2001). In evaluating a request for judgment notwithstanding the verdict, the facts must be considered in the light most favorable to the verdict winner. *Id.*

The decision to grant a new trial is one that lies within the discretion of the trial court. *Coker v. S.M. Flickinger Co., Inc.*, 533 Pa. 441, 625 A.2d 1181 (1993). A new trial should be granted only where the verdict is so contrary to the evidence as to shock one's sense of justice and not where the evidence is conflicting or where the trial judge would have reached a different conclusion on the same facts. *Davis v. Mullen*, 565 Pa. 386, 773 A.2d 764 (2001). The court should follow a two-step process in responding to a request for a new trial.

First, the trial court must determine whether a factual, legal or discretionary mistake was made during the trial. *Harman v. Borah*, 562 Pa., 455, 756 A.2d 1116 (2000). If it is determined that a mistake was made, the trial court must then evaluate whether the mistake provided sufficient basis for granting a new trial. The Supreme Court of Pennsylvania noted that:

> The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.

Id.

Additionally, a trial court's rulings as to evidentiary questions are controlled by the sound discretion of the trial court. Those rulings will not be disturbed unless a clear abuse of discretion is shown. *Sutherland v. Monongahela Valley Hosp.*, 2004 Pa. Super. 245, 856 A.2d 55, 59 (2004). An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion, the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused. *Id.*

Appendix B

DISCUSSION

I. Defendants' Motion for Post-Trial Relief

A. Expert Opinion to the Requisite Reasonable Medical Certainty.

Defendants' first assert that judgment not withstanding the verdict should be entered in their favor, or in the alternative, a new trial should be granted, because Plaintiff's standard of care expert did not base his opinions to the requisite degree of reasonable medical certainty. Plaintiff, of course, claims that the expert did meet the requisite standard.

Dr. Alan Pinshaw testified on Plaintiff's behalf as an expert in obstetrics and gynecology and opined whether Defendant Dr. Skutches deviated from the medical standard of care by not referring Plaintiff for a biopsy. Dr. Pinshaw testified regarding his procedure in making a determination as follows:

> A. The first thing I do is I go through their records and get a very broad outline of what this case is about. . . I then flesh out the facts of the case so that I, from the medical records, extract everything that I think is pertinent to an opinion that I might reach on a factual basis.
>
> . . .

So I flesh out a factual scenario, then I wait for the depositions to come in. As you're probably aware at this point these are questions and answers which put a little more color and detail into what's represented in the medical record.

Very frequently, any opinions that I might have after looking at the records, the medical records, might become omitted or changed on occasion, or I understand better in the general sense what's going on when I've heard how people talk about it.

And then I try to reach a conclusion that speaks to a reasonable medical certainty, which means more likely than not, and so advise counsel.

Q. *Well, is it more likely than not, or is it to a reasonable medical certainty?*

A. *It's the same thing in my opinion.*

Q. With regard to the opinions you rendered in this case, can you tell me what opinions you rendered and why you rendered them?

> A. I had in the instance, one central opinion, and that is that on March 23, 2004, when Barbara Glasow complained of a lump in her breast and sought medical attention, as a consequence of that encounter, a biopsy — and I'll explain what that is in a moment — needed to be taken.

(N.T., January 16, 2008, pp. 101-103) (emphasis added).

Dr. Pinshaw further testified:

> This opinion is based on the fact that for many years now, certainly longer than I've been in practice, it has been known that examining a breast lump, although you may have an idea what you think it is and that it is malignant or nonmalignant, that's the bottom line.
>
> You can form an opinion if you wish, but you are mandated to check the opinion by testing the tissue.
>
> We all have our suspicions. "I don't think this is malignant" or "This looks malignant." You need to go to the tissue and have a look at it, and the diagnosis of fact, blunt, whether it's nonmalignant or malignant will be reported to you after you've submitted tissue to the pathologist.

(N.T., January 16, 2008, p. 105). The doctor also testified:

> Whether or not this patient at that time had cancer depends on a specific test. Let's call it "The Watermelon Test" just for ease of reference.
>
> You take a slice out, you look at it under the microscope; on that basis you will decide whether or not, and you have definitive evidence whether or not there is a malignancy.
>
> . . .
>
> On that day, that lesion needed to be, and the lesion's a "boo-boo" if you will. That abnormality needed to be biopsied.

(N.T., January 16, 2008, pp. 110-111). In addition, the following exchange took place between the witness and Plaintiff's counsel:

> Q. Doctor, you indicate in your report that the appropriate thing is to biopsy, is that fair to say?
>
> A. Yes, sir.
>
> Q. When the appropriate thing is to biopsy, should you tell that to a patient?
>
> A. Yes, sir.

Q. If you don't tell that to a patient that you need to get a biopsy, is that a violation of the standard of care?

A. It is.

(N.T., January 16, 2008, p. 113). Dr. Pinshaw finished his direct testimony by agreeing that he firmly held the opinions that he testified to. (N.T., January 16, 2008, p. 115).

In order to establish a *prima facie* case in a medical malpractice action, a plaintiff must present a qualified medical expert who will testify to a reasonable degree of medical certainty that the defendant health care provider deviated from the medical standard of care, and that such deviation was the proximate cause of harm. *Mitzelfelt v. Kamrin*, 584 A.2d 888 (1990); *Brannan v. Lankenau Hosp.*, 417 A.2d 196 (1980). "Experts are not required to use 'magic words' but rather this court must look to the substance of the expert's testimony to determine whether his opinions were based upon a reasonable degree of medical certainty rather than upon mere speculation." *Vicaris v. Spiegel*, 936 A.2d 503 (Pa. Super. 2007). Further,

> The trial court must look to the substance and the entirety of the testimony in order to determine whether it meets this standard. "That an expert may have used less definite language does not render his entire opinion speculative if at some time during his

> testimony he expressed his opinion with reasonable certainty." *Carrozza v. Greenbaum*, 866 A.2d 369, 379 (Pa. Super. 2004), *appeal denied*, 584 Pa. 698, 882 A.2d 1004 (2005).

Freed v. Geisinger Medical Center, 910 A.2d 68 (Pa. Super. 2006). In *Corrado v. Thomas Jefferson University Hospital*, 790 A.2d 1022 (Pa. Super. 2001), the Pennsylvania Superior Court upheld the trial court's entry of nonsuit after it found the plaintiff's doctor did not testify with sufficient certainty. The Court reasoned as follows:

> Corrado argues a non-suit on behalf of Dr. John Cohn was improper because he presented sufficient evidence to satisfy his burden of proof against Dr. Cohn through the expert testimony of Dr. DeJager. In response, Dr. Cohn argues that because of Dr. DeJager's failure to state his opinion with sufficient certainty, the grant of non-suit was correct. We agree. In *Eaddy v. Hamaty*, *supra*, our Court stated:
>
> We acknowledge that an expert need not testify with absolute certainty or rule out all possible causes of a condition. Nor do we require an expert to testify in precisely the language used to enunciate the legal standard. Rather, we review expert testimony in its entirety to assess whether it expresses the

requisite degree of medical certainty: "An expert fails this standard of certainty if he testifies 'that the alleged cause "possibly", or "could have" led to the result, that it "could very properly account" for the result, or even that it was "very highly probable" that it caused the result.'"

Eaddy v. Hamaty, 694 A.2d 639, 642 (Pa. Super. 1997).

When asked whether he had an opinion based upon a reasonable degree of medical certainty if Dr. John Cohn deviated from the standard of care, Dr. DeJager answered, "more likely than not in my opinion he deviated from the standard of care." Dr. DeJager was then questioned about whether or not the decedent suffered any harm as a result of Dr. John Cohn's deviation from the standard of care, to which Dr. DeJager eventually responded, ". . . more likely than not [the decedent] would have responded to treatment in 1993 as she did a year later when they finally made the diagnosis of recurrent disease, that means that that patient would have been [sic] probably had a least 15 months symptom free status between 1993 and some time later." After reviewing his testimony in its entirety, we conclude that Dr. DeJager did not express the requisite degree of medical certainty. Corrado therefore failed to state a

> *prima facie* case of medical malpractice and the trial court's grant of non-suit was proper.

Id. at 1030-1031. (citations to the record omitted).

In *Carrozza v. Greenbaum*, 2004 Pa. Super. 464, 866 A.2d 369 (2004), defendant doctors, practices and hospitals appealed the denial of their post-trial motions for judgment n.o.v., or in the alternative a new trial, asserting that plaintiff did not present sufficient expert testimony on the alleged deviation from the standard of care or on causation. The radiologists in *Carroza* were found negligent for failing to recommend breast biopsies after reading plaintiff's mammogram films. The causation expert in the *Carrozza* trial testified as follows:

> Q. Do you have an opinion, within a reasonable degree of medical certainty, as to whether a biopsy performed in 1996 would have shown either cancer or a precancerous lesion?
>
> A. Yes.
>
> Q. And what is your opinion?
>
> A. I think my opinion is that more likely than not, if we had done a biopsy of the area of the calcifications in '96, we would have found either carcinoma in situ or a frank cancer at that time, a true cancer at that time.

Appendix B

******

So my opinion then as a surgical oncologist is to a reasonable degree of probability, [in 1996] there was carcinoma in situ. More likely than not, it was the same area of the breast where it was discovered [in 1999], and a biopsy later directed that [sic] the calcifications I think would have found carcinoma in situ.

Q. That is your opinion within a reasonable degree of medical certainty?

A. Yes.

******

Q. If a recommendation had been made for a biopsy and if a biopsy had been taken in 1998 or shortly after that mammogram was done in May of 1998, do you have an opinion, within a reasonable degree of medical certainty, as to whether that biopsy would have shown some, either a DCIS or a- the beginnings of an invasive cancer?

A. Yes.

Q. What is your opinion?

A. Again, I feel that either of those lesions would have been found at that time if they looked for it.

Id. at 381.

The *Carrozza* court examined the testimony in its entirety and found it sufficiently definitive to meet plaintiff's burden of proof as to both the standard of care and causation of harm. *Id.*

We have examined Dr. Pinshaw's testimony in its entirety, and find that he did not testify with the requisite degree of certainty to establish that Defendant deviated from the standard of care required in this matter. We find this case similar to *Corrado* in that the standard of care opinion was "more likely than not". Unlike *Carrozza*, *supra*, the opinions were never elicited to be to a reasonable degree of medical certainty.

Dr. Pinshaw unequivocally equated *his* reasonable degree of medical certainty with a "more likely than not" standard prior to offering any expert opinion. All opinions that followed, no matter how strongly worded, were based on an inappropriate degree of certainty. Dr. Pinshaw limited his testimony to "more likely than not" by giving his own meaning to the phrase "reasonable degree of medical certainty".

Although his opinions were "firmly" held, a complete reading of his testimony reveals that he firmly held his opinions to a more likely than not degree of certainty.

Such testimony is insufficient to meet the deviation of the standard of care requirement in a medical malpractice action. Plaintiff did not provide any additional standard of care experts, and therefore failed to state a *prima facie* case of medical malpractice.

B. Expert Opinion to the Proper Standard of Care.

Defendants' second claim is that he is entitled to a judgment notwithstanding the verdict or, in the alternative, a new trial, because Plaintiff's standard of care expert based his expert opinions on the standard of care applicable to a surgeon, not the applicable standard of care of an obstetrician-gynecologist. Plaintiff responds by first asserting that this issue was not appropriately objected to at trial and is therefore, waived. Alternatively, Plaintiff responds on the merits stating that her expert opined to the standard of care of an obstetrician-gynecologist, regardless of whether the obstetrician-gynecologist performs surgery or not, and if the obstetrician-gynecologist does not perform biopsies himself, then the obstetrician-gynecologist should tell the patient that she needs to get a biopsy performed by someone else.

Addressing the waiver issue first, Pa.R.C.P. 227.1, states in pertinent part:

> (b) except as otherwise provided by Pa.R.E. 103(a), post-trial relief may not be granted unless the grounds therefore,

(1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and

Note: If no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief.

Pa.R.E. 103(a) provides that the specific ground for an overruled objection, or the substance of excluded evidence, need not be stated at or prior to trial, or without having made an offer of proof, if the ground of the objection, or the substance of the evidence sought to be introduced, was apparent from the context.

(2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

Appendix B

The relevant testimony of Dr. Pinshaw included, in part:

Q. Could you explain what you base that opinion on, Doctor?

A. This is based on a very old and well-established surgical principle that a breast mass —

Mr. Laughlin: Objection.

The Court: Objection — that's non responsive, Doctor. Ask the question again, please. Wait. Is there another basis?

Mr. Laughlin: Yes. The nature of the principle. Mr. Margolis: I didn't hear that, Judge. I'm sorry.

The Court: Well, I think if the doctor starts his answer again we'll probably not have a problem. The question is, "Could you explain what you base that opinion on, Doctor?"

Appendix B

Witness: This opinion is based on the fact that for many years now, certainly longer than I've been in practice, it has been known that examining a breast lump, although you may have an idea what you think it is and that it is malignant or nonmalignant, that's the bottom line.

You can form an opinion if you wish, but you are mandated to check the opinion by testing the tissue.

(N.T., January 16, 2008, pp. 104–105).

It is asserted that Dr. Pinshaw did not connect his testimony to the standard of care applicable to an obstetrician-gynecologist nor did he testify that he was familiar with that standard of care. However, defense counsel did not object to the standard of care to which Dr. Pinshaw testified during Dr. Pinshaw's testimony or at the conclusion of it. Although one objection to the "nature of the principle" was made during the above colloquy, the doctor was permitted to rephrase his answer. If during Dr. Pinshaw's subsequent answer defense counsel believed the testimony was not being provided to the applicable standard of care of an obstetrician-gynecologist, a subsequent objection was required.

Appendix B

The failure to object to Dr. Pinshaw's testimony as it related to the standard of care applicable to an obstetrician-gynecologist precluded Plaintiff from having an opportunity to address the asserted problem during trial. Such an objection is required to preserve an issue for post-trial relief for such a reason. Because no objection was made, the issue was waived and cannot now be addressed post-trial. Accordingly, Defendants' second issue is denied as waived.

II. Plaintiff's Cross-Motion for Judgment Notwithstanding the Verdict and Cross Motion for Post-Trial Relief Pursuant to Rule 227.1(c).

A. Contributory Negligence.

Plaintiff asserts that she is entitled to judgment notwithstanding the verdict in the amount of $3,973,000, representing the full amount of the verdict, because Defendants did not offer expert testimony evidence that Plaintiff was contributorily negligent, nor did they provide a logical, reasonable, or practical basis for apportionment of negligence. Defendants respond that there was ample evidence at trial that Plaintiff's conduct in failing to obtain the prescribed ultrasound contributed to her increased risk of harm by delaying her diagnosis of cancer.

The plaintiff claims that Dr. Skutches' negligence delayed the diagnosis, and thereby delayed life-saving treatment, which increased the plaintiff's risk of harm.

Plaintiff's expert testified that, had diagnosis and treatment been prompt, the plaintiff's statistical chances for surviving the cancer would have been higher, thereby establishing an "increased risk of harm" case. (Plaintiff's Exhibit 7 D, Video Deposition of Gerald H. Sokol, M.D., January 12, 2008, pp. 02334-02336). The defendants' expert testified that there was no increased risk of harm, because the survival rate was the same whether the cancer was diagnosed in the Spring of 2004 or 11 months later on February 15, 2005. (N.T. January 17, 2008, p. 148-149, 190).

However, if the jury believed that the delayed diagnosis increased the risk of harm to the plaintiff, they were also free to consider the relative responsibility that the parties bore for the delay. Defendants presented expert testimony that an ultrasound would have called into question the misdiagnosis of Dr. Skutches. Therefore, by failing to obtain an ultrasound, plaintiff herself contributed to the delay in a correct diagnosis, and thereby increased her own risk of harm. The jury may consider that, if it accepts plaintiff's contention that delay did increase her risk of harm, it may also consider that she herself contributed to the delay.

Defendants did not provide expert testimony establishing the degree to which Plaintiffs failure to obtain the prescribed ultrasound increased her harm. Plaintiff cites the cases of *Martin v. Owens-Corning*, 515 Pa. 377, 528 A2d 947 (1987), and *Lee v. Pittsburgh Corning Corp.*, 420 Pa. Super. 423, 616 A.2d 1045 (1992), where defendants failed to present expert testimony on

the causation of lung cancer, for the proposition that the issue of comparative negligence should not have been submitted to the jury.

The cases relied on by the Plaintiff for the proposition that an expert witness is required in order to apportion causation are product liability cases. The instant case is not a product liability case, but an "increased risk of harm" case, pursuant to *Hamill v. Bashline*, 481 Pa. 256, 392 A.2d 1280, 1285 (1978). We did not find any authority that an increased risk of harm case requires the defendant to produce expert testimony to allow the jury to apportion negligence pursuant to the Comparative Negligence Act. In fact, the reduced threshold of proof necessary to be submitted to the jury envisions a more relaxed approach with regard to apportionment of responsibility. "Once the jury is apprised of the likelihood that defendant's conduct resulted in plaintiff's harm, that Section [323(a) of the Restatement (Second) of Torts] leaves to the jury, and not the medical expert, the task of balancing probabilities. . ." *Carrozza*, supra, citing *Hamil v. Bashline.*

The defendant is free to offer inconsistent defenses, which he did in this case. He claimed that the delay in diagnosis created no meaningful difference in the plaintiff's prognosis, but, if it did, the plaintiff herself must share the blame.

Therefore, the question for the jury to resolve is: did the plaintiff herself also contribute to the delay in

diagnosis, by failing to see Dr. Schadt when the lump continued to be painful, or for failing to get the prescribed ultrasound which would have revealed the need for a biopsy?

The plaintiff in a negligence action is contributorily negligent if his conduct falls below the standard of care to which he should conform for his own protection, and if his conduct is a contributing cause, with the defendant's negligence, in bringing about his harm. *Thompson v. Goldman*, 114 A.2d 160, 162 (Pa. 1955); *Columbia Med Group, Inc. v. Herring & Roll, P.C.*, 829 A.2d 1184, 1192 (Pa. Super. 2003). When there is any evidence of contributory negligence in a case, the jury must consider the issue, regardless of how slight the evidence is or how strong any contrary evidence may be. *Angelo v. Diamontoni*, 871 A.2d 1276, 1280 (Pa. Super. 2005), *appeal denied*, 889 A.2d 87 (Pa. 2005). Because it was up to the jury to determine the factual responsibility for the delay, not only would an expert have been meaningless on this issue, but irrelevant. An expert could not have resolved the factual issue of whether the plaintiff failed to take the steps necessary to protect her own health.

Appendix B

B. Jury Instructions Requesting "Intentional Alteration or Destruction of Medical Records" and Striking the "Error of Judgment" Instruction.

Plaintiff has objected to a new trial, but has requested certain measures regarding jury instructions in the event a new trial is granted. Plaintiff is not seeking a new trial and in fact objects to such relief. We find the request regarding specific jury instructions in the absence of the relief requested nothing more than a request for an advisory opinion, which we decline to compose.

BY THE COURT:

s/ Carol K. McGinley, J.
CAROL K. McGINLEY, J.

Dated: June 3, 2008

APPENDIX C — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED MAY 26, 2010

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 669 MAL 2009

Petition for Allowance of Appeal from the
Order of the Superior Court

BARBARA L. GLASOW,

Respondent

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL PHYSICIAN GROUP,

Petitioners

ORDER

PER CURIAM

AND NOW, this 26th day of May, 2010, the Petition for Allowance of Appeal is hereby **DENIED.**

Madame Justice Orie Melvin did not participate in the consideration or decision of this matter.